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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-1465

SAHARA-TAHOE CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, *and*
HOTEL-MOTEL-RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 86, HOTEL & RESTAURANT EMPLOYEES & BARTENDERS INTERNATIONAL UNION, AFL-CIO,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT UNION'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 581 F.2d 767. (Pet.App. 6-15). The decision and order of the National Labor Relations Board are reported at 229 N.L.R.B. 1094. (Pet.App. 16-100).

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1978. Thereafter, on November 27, 1978, a petition for rehearing was denied. (Pet.App. 5). The time for

filing a petition for a writ of certiorari was extended by Mr. Justice Rehnquist to and including March 23, 1979. The petition was timely filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

1. Whether the Board abused its discretion in holding that the presumption of majority status, derived from petitioner's voluntary recognition of the Union as the majority representative of its own employees, could not be defeated by petitioner's subsequent withdrawal from a multiemployer bargaining unit?

2. Whether the Board's finding that petitioner had not established a reasonably grounded doubt of the Union's majority status was supported by substantial evidence?

STATUTE INVOLVED

1. Section 8(a) of the National Labor Relations Act, 29 U.S.C. § 158(a), provides in pertinent part:

> "It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;
>
> * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees * * *."

2. Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b), provides in pertinent part:

> "Whenever it is charged that any such person has engaged in or is engaged in any such unfair labor practice, the Board * * * shall have power to issue and cause to be served on such person a complaint stating the charges * * * and containing a notice of hearing * * *: *Provided,* that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge * * *."

STATEMENT OF THE CASE

The Brief For The National Labor Relations Board In Opposition succinctly and accurately states the case.

ARGUMENT

I

THE BOARD AND COURT APPLIED THE ONLY CONTROLLING STANDARD IN FINDING THAT THE PRESUMPTION OF MAJORITY STATUS APPLIES IN THIS CASE.

The petition seeks to divert the Court's attention from the underlying dispute. The unfair labor practice charges which the court ultimately enforced arose directly from the petitioner's *unilateral* action of abruptly refusing to bargain with the Union, thereby disrupting a continuous, nine-year collective bargaining history.

The Board and courts have uniformly held that an employer who takes such action must overcome the presumption of the continued majority status of a union by establishing either that the union was, in fact, supported by only a minority of the employees, or that the employer had a good faith reasonable doubt of majority support for the union at the time of the refusal to bargain. This Court has recognized the validity of that presumption by its adoption

of the seminal Board decision in *Celanese Corporation of America*, 95 N.L.R.B. 664 (1954).[1]

Petitioner presents the Court with several explanations for its inability to rebut the presumption of continued majority status of the Union. Petitioner's main argument is that the presumption is inapplicable because petitioner voluntarily recognized the Union in 1965; and as a corollary, the presumption could not survive petitioner's withdrawal from the multiemployer bargaining unit in 1974. Petitioner also argues that application of the presumption in this case somehow denies employees their freedom of choice. Finally, it argues that it was impossible to meet its burden of proof. None of these arguments raise any issue warranting review by this Court.

A. Voluntary recognition of the Union is the proper factual predicate for application of the presumption

Consistent with established judicial authority, the Board held in this case that petitioner's voluntary recognition of the Union as the bargaining representative of its bar and culinary employees gave rise to a continuing presumption of the Union's majority status among those employees. (Pet.App. 18 n.9).[2] Cf. *N.L.R.B. v. Frick Co.*, 423 F.2d 1327, 1330-1331 (3rd Cir., 1970); *N.L.R.B v Cayuga Crushed Stone, Inc*, 474 F.2d 1380, 1383 (2d Cir., 1973); *N.L.R.B. v. Denham*, 469 F.2d 239, 244 (9th Cir., 1972), vacated on other grounds 411 U.S. 945 (1973). As this Court has stated, voluntary recognition without a Union majority would violate the Act. *International Ladies Garment Workers' Union v. N.L.R.B.*, 366 U.S. 731, 737-739 (1961). Once established, the presumption of continued majority status continues throughout the term of the collective bargaining agreement and beyond. *Celanese Corporation of America, supra*, at 672.

[1] See, *NLRB v. Burns International Security Services*, 406 U.S. 272, 279 n.3 (1972), in which the *Celanese* decision was cited with approval.

[2] The Board relied upon its decision in *Tahoe Nugget, Inc., d/b/a Jim Kelley's Tahoe Nugget*, 227 N.L.R.B. 357 (1976). Similarly, in enforcement proceedings, the Court relied on its reasoning in *N.L.R.B. v. Tahoe Nugget, Inc.*, 485 F.2d 293 (9th Cir., 1978), involving the issue of voluntary recognition, and withdrawal from the multiemployer bargaining unit. A petition for writ of certiorari has also been filed in that case. (No. 78-1379).

The Board and court of appeals decisions clarify that it was the petitioner's own action of voluntarily recognizing the Union as the majority representative of its employees in 1965 which gave rise to the presumption of continued majority status. (Pet.App. 9, 18 n.9). Thus, the lower decisions were in conformity with the established judicial authority and review is not warranted.

Based upon this predicate, the court of appeals, relying upon its decision in *N.L.R.B. v. Tahoe Nugget, supra*, upheld the Board's application of the presumption following petitioner's withdrawal from the multiemployer unit:

> "When respondents joined the Association and recognized the Union, they implicitly declared their employees favored the Union. Thus, majority status can be directly inferred from the employer's own conduct; the presumption is not derived from the larger unit's majority, but originates with the employer's implicit declaration of a majority in the single employer unit. Moreover, the original factual inference is convincing: employers normally will not knowingly violate the law and union fraud is rare. Continued membership in the larger unit does nothing to negate this principle even

though the larger unit becomes the appropriate one for bargaining. The original presumption subsists: withdrawal from the unit simply entails a reversion of the original unit, a unit previously determined from the employer's own conduct to favor union representation."

[Pet.App. 12-13]

Thus, petitioner's assertion that the factual predicate for the presumption is absent in this case is without foundation. (Pet. 14-15). It was petitioner's voluntary recognition of the Union in 1965 as the majority representative of its employees which gave rise to the presumption. When the petitioner withdrew from the multiemployer association in 1974, it reverted to that unit.[3]

Cases relied upon by petitioner to establish conflict only serve to underscore the error in its approach. For example, in *N.L.R.B. v. Richard W. Kaase Co.*, 346 F.2d 24 (6th Cir., 1965) (Pet. 15-18), the recognition of the union was based upon election of employees within a multiemployer

[3]Petitioner's contention that its initial recognition of the Union was somehow distinguishable from the situation in *Tahoe Nugget, supra*, is factually unsupportable. (Pet.15). Petitioner contends that at the time it joined the multiemployer bargaining unit, it had no bar and culinary employees to "declare" favored the Union. However, it is clear that in the present case it was not the act of joining the multiemployer bargaining unit which bound petitioner to the agreement. The voluntary recognition of the Union occurred sometime later, after the petitioner had hired bar and culinary employees. Petitioner joined the multiemployer bargaining unit in April, 1965. After that time the Union was informed that petitioner would become party to the agreement *after it employed bartenders and culinary workers* (Pet. App. 67-68). Thereafter, when petitioner in fact employed bar and culinary employees it became bound by the agreement. It was through that act that petitioner voluntarily recognized the Union, and through which the presumption arose. Petitioner's claim that it had no employees to "declare" at the time it recognized the Union is a simple misstatement of fact.

unit rather than by voluntary recognition, as here. In the *Kaase* situation, the union must receive a majority of votes of the participating employees of *all* employers in the unit to obtain representative status. Thus, the union may become majority representative even though it did not receive a majority of the employees of *each* individual employer member of the multiemployer unit. In the present case, the presumption was not derived from union majority in the multiemployer unit, but rather from the petitioner's act of voluntarily recognizing the Union in 1965 as the majority representative of its employees. Petitioner's reliance on *Kaase* is unavailing, and asserted conflicts in the circuits is imaginary.[4]

The Board and court of appeals correctly held that petitioner could not avoid application of the presumption by now claiming that the initial recognition of the Union more than nine years earlier had been unlawful. Because petitioner's recognition of a minority union would have been an unfair labor practice occurring beyond the six-month limitation period in Section 10(b) of the Act, both the Board and the court of appeals concluded petitioner could not revive a legally defunct unfair labor practice in order to defend against a present refusal to bargain. *Local Lodge No. 1424, I.A.M. v. N.L.R.B.*, 362 U.S. 411, 416 (1960):

[4]Petitioner also relies on *N.L.R.B. v. Sheridan Creations, Inc.*, 357 F.2d 245 (2nd Cir., 1966), cert. denied 385 U.S. 1005 (1967) (Pet. 16). In that case, it was held that an employer member of a multiemployer unit could not refuse to bargain with the union as the basis of a doubt of union majority status among its own employees. Moreover, the employer had not withdrawn from the multiemployer unit. Hence, the question of the status of the presumption upon withdrawal from or dissolution of a multiemployer unit was not presented and the case is inapposite.

N.L.R.B. v. District 30, U.M.W., 422 F.2d 115, 122 (6th Cir., 1969) *cert. denied,* 398 U.S. 959 (1970).[5]

B. Application of the presumption does not deny freedom of choice to employees

Petitioner's argument that the application of the presumption somehow denied employees of their freedom of choice was duly considered and rejected by the Board and court of appeals. The court again relying on its decision in *N.L.R.B. v. Tahoe Nugget, Inc., supra,*[6] correctly recognized that employees have a direct statutory procedure available to them in order to choose whether or not they desire Union representation. The decisions below do not compromise that freedom of choice. In noting that *employees* were free to petition for an election without interference from the petitioner, the court recognized that a decertification petition filed by the employees pursuant to Section 9(c)(1)(A)(ii) of the Act is a true expression of employee dissatisfaction. In the absence of such a petition, the court was properly

[5]Petitioner also implies that the circumstances of the initial recognition should be admitted to bolster petitioner's claim of good faith in refusing to bargain in 1974. (Pet. 23). Even if petitioner's late-confessed unlawful recognition was admitted to show its good faith in suddenly deciding to accord their employees a free choice of bargaining representation in 1974, the court of appeals correctly concluded that mere subjective belief was not a sufficient ground to disrupt the stability of the bargaining relationship. Consistent with other courts of appeals, and in reliance on its decision in *N.L.R.B. v. Tahoe Nugget, Inc., supra,* the court held that petitioner's claimed reasonable doubt could only be sustained by objective facts showing a majority of their employees no longer desired Union representation. *Terrell Machine Co. v. N.L.R.B.,* 427 F.2d 1088, 1090 (4th Cir., 1970) *cert. denied* 398 U.S. 929 (1970); *Lodges 1746 and 743, I.A.M. v. N.L.R.B.,* 416 F.2d 809 (D.C.Cir., 1969) *cert. denied* 396 U.S. 1058 (1970); *N.L.R.B. v. Vegas Vic, Inc.,* 546 F.2d 828, 829 (9th Cir., 1976) *cert. denied* 434 U.S. 818 (1978).

[6]*N.L.R.B. v. Tahoe Nugget, Inc., supra* at 301.

skeptical of the petitioner's attempt to portray itself as the champion of employee freedom of choice. Such recognition is in accordance with the directive of this Court, as well as other circuits. *Brooks v. N.L.R.B.,* 348 U.S. 96, 103 (1954); *Retired Persons Pharmacy v. N.L.R.B.* 519 F.2d 486, 490 (2nd Cir., 1975). Thus, petitioner's characterization of this dispute as one involving employee freedom of choice (Pet. 8, 12, 21-22), is misleading; although an election was available to employees, they never chose to initiate such a procedure.

The Board and court also recognized that policy considerations militate in favor of the presumption in this case. The presumption facilitates attainment of the Act's underlying purpose: industrial peace. Conversely, permitting the petitioner to refuse to bargain with the Union after a nine-year bargaining relationship, in pursuit of asserted but unexercised employee rights is antithetical to that goal. *Brooks v. N.L.R.B., supra* at 103. *N.L.R.B. v. Tahoe Nugget, Inc., supra* at 301-302.

II

THE COURT OF APPEAL AND BOARD PROPERLY ASSESSED THE CUMULATIVE IMPACT OF FACTORS CLAIMED TO SUPPORT PETITIONER'S REASONABLE DOUBT.

Petitioner's final contention is that the Board and court have created an irrebuttable presumption. (Pet. 20-28). This contention has no merit. Petitioner has confused the concept of "irrebuttable presumption" with its own failure to produce sufficient evidence to rebut the presumption.

The record is replete with patient consideration of the petitioner's evidence by both the Board and the court.[7] Although the petitioner was given every opportunity to present its evidence, the Board found the evidence "speculative and subjective". (Pet. App. 19). The court of appeals found the evidence "ambiguous at best." (Pet. App. 15). These statements manifest the fact that the decisions below were not the product of an irrebuttable presumption, but rather, of the petitioner's failure to produce evidence sufficient to rebut the presumption. No case or authority cited by petitioner permits it to meet its burden of proof by producing speculative or conjectural evidence. Its assertion of conflicting decisions is thus unavailing.[8]

Petitioner's argument that the Board and court "ignored the totality of the evidence relied upon by the Hotel" is likewise unsupportable. (Pet. 24). The court clearly considered the totality of the evidence and found that:

> ". . . the cumulative weight of all of the evidence is not enough to rebut the presumption. It is ambiguous at best and we see no reason to disturb the Board's finding that the web [of circumstances] contains not a single thread of evidence that the employees themselves had told [the Hotel] that they no longer wanted the Union to represent them. Indeed, the web contains not a single thread of evidence that reflects or even purports to reflect the sentiments of the employees themselves—any unit employee much less a majority of the unit employees—on the question of union representation. Absent such threads, the web of circumstances is like the Cheshire cat's grin—nothing behind it." (Pet.App. 15).[9]

[7]Petitioner also implies in its petition that it has established certain "facts". (Pet. 23-24). In fact, the evidence was found to be either irrelevant or subjective in that it did not indicate how the petitioner's employees felt about continued Union representation. Petitioner's continued reliance on those factors at this date indicate its failure to come to come to grips with the reality that the evidence presented did not rise to a level sufficient to rebut that presumption. (Pet.13).

[8]Petitioner erroneously asserts that only direct interrogation of employees will permit it to rebut the presumption. (Pet. 21). Again, petitioner essentially complains about the stringency of the standard. Similarly, petitioner's contention that employees may not be polled is erroneous. The Board permits polling under certain circumstances. *Strucksnes Construction Co., Inc.*, 165 N.L.R.B. 1062 (1967).

The Board also considered the cumulative effect of the evidence, and found it deficient even on that basis. (Pet. App. 19-24).

Petitioner's argument is thus reduced to a claim that the Board erred in the evidentiary weight accorded each of petitioner's asserted objective considerations since similar factors, *once established*, had previously been held to justify a refusal to bargain. (Pet. 21-22). In essence, this is a confession that the petitioner engaged in brinksmanship in attempting to thwart collective bargaining among its employees. As another court of appeals stated in an analogous context, ". . . one who engages in 'brinksmanship' may easily overstep and tumble into the brink." *Wausau Steel Corp. v. N.L.R.B.*, 377 F.2d 369, 372 (7th Cir., 1967). Clearly, petitioner's disagreement with the Board's findings with respect to the weight of the evidence, or factual conclusions to be drawn therefrom, does not merit review by this Court. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 490-491 (1951). Moreover, because such an evidentiary determination turns on the totality of all the circumstances, review of the Board's findings cannot have a substantial impact on other litigants.

[9]*N.L.R.B. v. Tahoe Nugget, Inc., supra*, at 305 n.46.

CONCLUSION

For all the above reasons, as well as for the reasons stated in the Brief For The National Labor Relations Board In Opposition, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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